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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ANTONIO GALINDO,

Defendant and Appellant.

C060014

(Super. Ct. No.
07F06903)

A jury convicted defendant Jose Galindo of 11 counts of child molestation involving his two daughters, and sustained an allegation that there were multiple victims. Sentenced to state prison for an indeterminate term of 30 years to life, defendant argues only that the trial court prejudicially erred in allowing the introduction of expert testimony regarding child sexual abuse accommodation syndrome (CSAAS) because the theory of the defense case did not implicate any of the concerns that CSAAS addresses. We shall affirm.

FACTS

As we do not find any error requiring the assessment of prejudice, the particulars of the offenses are not relevant. We focus otherwise on evidence to which CSAAS was pertinent.

A

Before trial, the parties filed dueling motions in limine seeking to admit or exclude the expert testimony on CSAAS. The prosecutor noted in his motion that he had concerns about the delay in reporting the abuse, the victims' passive responses to the abuse and willingness to return to defendant's company, and the inconsistencies in their reports.

After commenting that defense counsel's assertions about the inadmissibility of CSAAS were outdated, the prosecutor noted he would limit the expert's testimony strictly to hypothetical victims without giving the expert access to the investigative materials or the victims in the present case, and also would be asking the court to employ the pattern instruction limiting the manner in which the jury could use the evidence.¹ He asserted that it was proper to introduce the evidence during his case-in-chief if defense counsel called the credibility of child victims

¹ After closing argument, the court instructed the jury, "Now you have heard testimony from Dr. Urquiza regarding [CSAAS]. [¶] [His] testimony about [CSAAS] is not evidence that the Defendant committed any of the crimes charged against him, and you must not assume from [this] testimony that a molestation did or did not occur. [¶] You may consider this evidence only in deciding whether or not [the victims'] conduct was not inconsistent with the conduct of someone who has been molested in evaluating the believability of their testimony."

into question during voir dire or cross-examination. The prosecutor also cited his particular concern that the delay between the incidents and their report in January 2007 would become an issue for the jury needing explanation, a "white elephant" about which the jurors were going to be curious regardless of whether it was an explicit part of the defense case. Defense counsel asserted CSAAS should only be permitted in rebuttal in response to any indication of a defense theory that the delay was evidence of fabrication.

The trial court noted that if the defense rested without presenting evidence, it would then be able to broadside the prosecution during closing argument with explicit attacks on the victims' credibility. For that reason, the court permitted the prosecutor to introduce the expert testimony in his case-in-chief, subject to any renewed defense objection at that time.

B

Defendant and the mother of the victims were involved for several years, during which their older daughter was born in 1996 and the younger in 1998. Their relationship ended in 2000 when the mother discovered his infidelity. Both subsequently married other people and had additional children.

During the 2006 Christmas holidays, the girls were visiting defendant, who was staying in his mother's home. They shared a bed with him.

Over the course of their visit with defendant, they met a younger half-sister of whom they had not previously been aware (H.W.), born in 2000 to the woman (Jessica W.) that defendant

had begun dating while the mother was pregnant with the younger victim in 1998. The victims also met defendant's pregnant girlfriend, whom he was about to marry. At some point, the older victim told their mother about meeting their half-sister H.W.

In January 2007, the younger victim told her mother that defendant had molested her while she was staying with him over the holidays. The older daughter then told her mother the same thing had happened to her years earlier.

A detective interviewed the victims that night. A social worker conducted recorded interviews with the victims 10 days later. Physical examinations of the victims did not reveal any evidence of sexual trauma, which is the result in 95 per cent of cases involving child victims.

During four separate pretext calls with defendant on January 22, 2007, in which the victims' mother lied about finding corroborating evidence, defendant never admitted committing any acts of penetration. She did get him to admit that he may have inadvertently run his hand over the younger victim's vagina when they were sharing the bed, and she may have come in contact with his erect penis in his shorts (for which he had apologized to the younger daughter the next morning).

Over the course of the two sets of interviews and in their testimony at trial, there were discrepancies in the victims' accounts of the details of molestations (which in the case of the older daughter dated back a number of years). The parties spell these out in their briefs. It is sufficient for our

purposes simply to note the existence of these factual conflicts, and that defense counsel explored some of them while cross-examining the victims and the detective who interviewed them.

During cross-examination, the mother admitted that even by 2006 she had not wanted her children to meet any of defendant's other children. After their break-up, she had been present when defendant was writing support checks for H.W., and claimed she wrote the notation "unwanted child" on the memo line of one at his behest. She denied ever attacking Jessica W. In 2003, when she and defendant had talked about reconciling, she argued with him about dating another woman. Defendant had to restrain her from attacking this woman physically, and during the confrontation the mother said her children would never be allowed in this woman's presence. The mother acknowledged being present merely as a bystander when her sister (now married to the father of an older child of defendant's current wife) attacked defendant's current wife at a club three or four years earlier when defendant was there with his current wife. She was adamant that she had not induced her children to accuse defendant in retaliation for defendant's womanizing.

C

Toward the end of the prosecutor's case, he called the CSAAS expert, Dr. Anthony Urquiza, a psychologist and professor at the UC Davis Medical Center. He explained CSAAS first arose as an educational concept in the early 1980s as part of efforts to improve therapy of child victims by identifying five common

unexpected responses to sexual abuse.

Victims can be *secretive* as a result of coercion, either express or arising out of the relationship with the offender. There can be feelings of *helplessness* arising from the lack of power to respond or having anyone else to protect them. Victims can experience *entrapment* and *accommodation*. These are simply the state of being trapped without alternatives and the coping mechanisms children develop as a result, which can include disassociation from unpleasant emotions. In nearly three out of four cases, there is *delayed* disclosures of abuse of at least a year, which can become more aggravated if the relationship between abuser and child is close. Another aspect of this characteristic is *unconvincing* disclosure: child victims will test the waters with a less extreme version of what happened and then add details as they feel more comfortable, and also a child's underdeveloped ability to distinguish between events and account for the passage of time leads to confusion and inconsistencies in reports of abuse. Finally, *retraction* occurs up to 25 per cent of the time, usually when a family member is involved and there is pressure to withdraw the accusation.

Not every victim experiences every characteristic. These characteristics also do not have any diagnostic value, so their presence or absence does not indicate that abuse has or has not taken place (which the expert noted has been a frequent misuse of CSAAS characteristics on the part of both prosecutors and defense counsel). The expert disclaimed any knowledge of the facts of the present case, or any attempt to offer an opinion on

whether the victims were in fact abused. He emphasized he was testifying simply to dispel misunderstandings that a juror might have about responses to sexual abuse.

After this testimony, the jury watched video recordings of the social worker's interviews with the victims, and received transcripts.² The prosecutor then rested his case.

D

Defendant testified that after their break-up, the victims' mother threatened that he would live to regret it if he ever introduced their children to soon-to-be-born H.W. He asserted the victim's mother wrote "unwanted child" on his support check on her own initiative. She had physically attacked the woman he was dating in 2003, and never liked his current wife. He believed she had coached his children to make false claims against him, in order to take advantage of the accidental touchings at Christmas to which he had admitted.

Jessica W. testified that the mother physically attacked her at the time for coming between her and defendant. Defendant's current wife testified that the victims' mother did not want the victims to have any contact with her, and the mother had in fact joined in the attack (with her sister) at the club where the current wife had been out with defendant.

E

Defense counsel in closing argument disparaged the CSAAS

² Transcripts of the interviews are part of the record on appeal through a settled statement.

testimony as unhelpful in determining whether the charges were true, pointing out that it could not explain why the victims did not cry during the recorded interview but did while testifying, nor could it help determine whether the charges were true. With respect to the older victim, he argued the abuse could not have happened in the time frame she suggested (2001-2002) because they were not living at the location she described, and therefore she had made up the claims simply to be supportive of her sister in response to leading questions in her recorded interview. As for the younger victim, he highlighted the differences between her recorded interview and her testimony. He then turned to the mother, describing her as a scorned woman who had harbored anger for years and coached her children's account.

DISCUSSION

I

The People contend the defendant has forfeited the issue on appeal because he did not renew an objection to the CSAAS expert testimony at trial. They assert the trial court did not have the "full evidentiary context" at the time of the hearing in limine. We disagree.

People v. Morris (1991) 53 Cal.3d 152 finally resolved competing lines of authority on this issue. A motion in limine is a determinative evidentiary ruling that a party can renew on appeal where there is a specific objection to particular body of evidence, and where the opposing party cannot point to anything that changed the evidentiary context such that there was a basis

for the court to reconsider its ruling. (*Id.* at pp. 188-189.) That is the situation here. The issue is therefore cognizable on appeal.

II

Defendant argues that the manner in which he presented his defense did not implicate any of the five areas of concern in CSAAS. Therefore, it was not admissible to disabuse the jury of any misconceptions regarding the responses of child victims to abuse. In particular, defendant claims that the jury did not need to consider the delay of the older victim in reporting the abuse antedating the Christmas 2006 holidays in determining whether or not the mother coached her. As a result, he asserts he was subject to "highly prejudicial" CSAAS testimony without any compensating probative value. In assessing prejudice, he points to the inconsistencies between the testimony of the victims and their recorded interviews. He suggests the limiting instruction did not prevent the jury from discounting this evidence that otherwise would have undermined the credibility of the victims.

We review the trial court's decision admitting the CSAAS testimony for an abuse of discretion. (*People v. Wells* (2004) 118 Cal.App.4th 179, 186 [*Wells*].)

Based on authority finding expert testimony regarding "rape trauma syndrome" inadmissible as substantive proof that a rape occurred because the scientific community does not find it a sufficiently reliable diagnostic tool under *People v. Kelly* (1976) 17 Cal.3d 24, CSAAS testimony is similarly restricted to

the limited purpose of disabusing a jury of misconceptions about the reaction of child victims to sexual abuse. (*Wells, supra*, 118 Cal.App.4th at pp. 187-188.) In this regard, California affords criminal defendants greater protection than other jurisdictions in which at least rape trauma syndrome can be used as substantive proof. (*Id.* at pp. 190-191.) The expert cannot tailor the testimony in such a fashion as to invite a jury's use of the characteristics as predictive tools. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 393.) Thus, the prosecutor must connect CSAAS characteristics with particular evidence in the case, such as delay or recanting. (*Id.* at p. 394; *People v. Harlan* (1990) 222 Cal.App.3d 439, 449-450 [prosecutor could point to cross-examination of victim that attacked delay and inconsistencies as basis for CSAAS evidence in case-in-chief]; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 735-736 [same].)³ As the various CSAAS characteristics "are as consistent with false testimony as with true testimony. . . . the admissibility of [CSAAS] testimony must be handled carefully by the trial court." (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744 [*Patino*].) It is a proper part of the prosecution case-in-chief where defense cross-examination—or *where the evidence itself*—raises issues about the victim's credibility for reasons related to a CSAAS characteristic. (*Id.* at p. 1745 [cross-examination

³ The expert may generally outline all the characteristics in the CSAAS profile even if not all of them are implicated in the case. (*People v. Bothuel* (1988) 205 Cal.App.3d 581, 588.)

about delay in reporting and return to molester's home; evidence of itself would also raise questions in minds of jurors]; *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 159-160 [jurors were skeptical of victim's credibility in voir dire; defense counsel played to this in cross-examination].)

Defendant's argument fails in that it artificially parses two sides of the same coin. The defense was not merely offering a theory of maternal coaching without any attack on the victim's credibility. The jury not only had to decide whether the mother had a motive to coach the victims, but also had to resolve the issue of the credibility of the victims as well in determining whether she *actually* coached them. Toward that end, the defense did not entirely avoid the areas coming within CSAAS concerns. The defense may not have made an express attack on the delay in reporting until after the Christmas 2006 holidays, but this was implicit in the argument that it was the meeting with H.W. and the pregnant wife-to-be that caused the mother to seize upon the accidental touching to which defendant admitted in order to eke out revenge. Moreover, the defendant highlighted a number of inconsistencies in the accounts of the victims (and continues to do so on appeal). In any event, even if the defense had entirely avoided direct attacks on the victims' credibility in pressing its theory of maternal pressure, the evidence in the record of delayed disclosure, inconsistencies, and continued association with the abuser of itself would raise these "white elephant" issues with the jury (as in *Patino*), which the prosecutor in the present case properly pointed out in seeking

to have the CSAAS expert testify. We do not find any abuse of discretion in admitting the evidence.

We also find that the trial court carefully handled the evidence. The expert did not suggest he was giving any opinion regarding the present case, and specifically cautioned the jury against using the CSAAS characteristics as diagnostic criteria. He did not structure his testimony to reflect the specific facts of the case to suggest the characteristics necessarily applied to the victims. The limiting instruction emphasized these restrictions. The instruction also did not prevent defendant from effectively arguing against the credibility of the victims, because it in essence communicates the concept only that the victims are not *necessarily* lying as the result of delay or inconsistencies. It does not suggest (as defendant contends) that these factors are removed from consideration in connection with credibility. We therefore do not find any error in the admission and use of the CSAAS evidence.

DISPOSITION

The judgment is affirmed.

We concur: BLEASE, Acting P. J.

HULL, J.

ROBIE, J.